

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENNETH SMITH,

:

03 Civ. 3318 (LAP)(JCF)

:

Petitioner,

:

REPORT AND

RECOMMENDATION

:

- against -

:

:

ELIOT SPITZER, Attorney

:

General, State of New York

:

:

Respondent.

:

- - - - -X

TO THE HONORABLE LORETTA A. PRESKA, CHIEF JUDGE:

It has come to my attention that the petitioner in this habeas corpus proceeding, Kenneth Smith, submitted two letters to the Court dated December 22, 2011 and February 9, 2012 (Docket nos. 44 and 45), addressed to the Honorable Loretta A. Preska, Chief Judge, seeking to vacate the judgment denying his petition. Mr. Smith requests this relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure based on a purported change in the law. For the reasons set forth below, I recommend that his motion be denied.

Background

The petitioner is currently serving a sentence for his 1995 conviction in New York State Supreme Court, New York County, for four counts of Robbery in the Second Degree in violation of New York Penal Law § 160.10(2)(b). In 2003, he filed a petition for a writ of habeas corpus in this Court challenging his conviction on the ground, among others, that he was denied his Sixth Amendment

right to counsel when his application to proceed without an attorney was granted without his being properly warned of the risks. In a Report and Recommendation dated July 16, 2004, I recommended that the petition be denied. After Judge Preska adopted that recommendation on December 17, 2004, judgment was entered dismissing the petition. Mr. Smith appealed, and the Second Circuit Court of Appeals dismissed the appeal on February 9, 2006, finding that he had failed to make a substantial showing of the violation of a constitutional right.

More than six years later, the petitioner submitted the letter motions at issue, arguing that judgment should be vacated and his petition granted based on a change in the law. In particular, he contends that he is entitled to relief based on the decision of the New York Court of Appeals in People v. Crampe, 17 N.Y.3d 469, 932 N.Y.S.2d 765 (2011), which, according to Mr. Smith, sets out the binding standard for assessing a waiver of the right to counsel, which was not adhered to in his case.

Discussion

The fatal flaw in the petitioner's argument is his assumption that Crampe establishes the law in this Court. While federal courts must follow the New York Court of Appeals' interpretation of New York state law, they are not bound by a state court's construction of the United States Constitution. See Carvajal v.

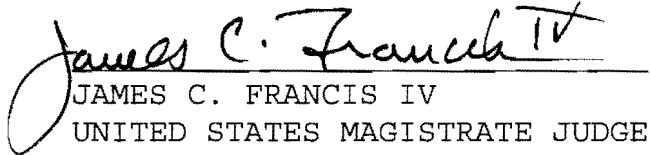
Artus, 633 F.3d 95, 111 (2011); Portalatin v. Graham, 624 F.3d 69, 84 (2010). Therefore, the determination in Crampe cannot serve as a basis for reopening Mr. Smith's petition.

Moreover, Crampe does not reflect any change in the federal constitutional standards for waiver of the right to counsel. The Supreme Court cases that it refers to, Iowa v. Tovar, 541 U.S. 77 (2004), and Patterson v. Illinois, 487 U.S. 285 (1988), were both decided before I issued my Report and Recommendation, before Judge Preska adopted it, and before the Second Circuit dismissed the petitioner's appeal, and so were already part of the legal landscape when Mr. Smith's petition was denied.

Conclusion

For the reasons set forth above, I recommend that the petitioner's motions to vacate the judgment dismissing his petition (Docket nos. 44 and 45) be denied. Pursuant to 28 U.S.C § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objection shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Loretta A. Preska, Room 2220, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,


JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
July 24, 2012

Copies mailed this date:

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